STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 8, 2007
v	No. 264367 Macomb Circuit Court
ROEDERICK MARTIN HUNTER, Defendant-Appellant.	LC No. 04-003483-FC

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for eight counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) [penetration of a person under 13 years of age], and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) [sexual contact with person under 13 years of age] for acts perpetrated against his girlfriend's daughter. Defendant was sentenced to 25 to 75 years in prison for each first-degree criminal sexual conduct conviction and to 7 to 15 years in prison for the second-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that the trial court deprived him of a fair trial when it refused to conduct an in camera inspection of the victim's school and counseling records. We disagree. This Court reviews a trial court's decision regarding whether to conduct such an inspection for an abuse of discretion. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). This Court defers to the trial court's judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

In general, confidential communications made to sexual assault counselors, social workers, and psychologists are privileged. *People v Stanaway*, 446 Mich 643, 658-660; 521 NW2d 557 (1994); MCL 600.2157a; MCL 333.18513; MCL 330.1750. The purpose of affording privilege to such communications is to prevent a chilling effect on the victim's willingness to disclose information necessary for effective therapy. *Id*. at 658-659, 678. However, a trial judge has the option to perform an in camera inspection of privileged records where the defendant demonstrates a "good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense." *Id*. at 677. Information is material if there is a reasonable probability that it would change the outcome of the trial. *People v Fink*, 456 Mich 449, 458-459; 574 NW2d

28 (1998). Only if the trial court is satisfied after in camera inspection that the records reveal evidence necessary to the defense is the evidence to be supplied to defense counsel. *Stanaway*, *supra* at 679.

Defendant sought the victim's counseling and school records to search for the presence or absence of characteristics associated with sexual abuse, such as falling grades and behavioral difficulties, and to examine whether methods of treatment and techniques employed during counseling impacted the victim's disclosure. The trial court concluded that defendant failed to demonstrate a good-faith belief grounded in articulable fact that there was a reasonable probability that the requested records were likely to contain material information necessary to his defense. Defendant moved for reconsideration. In denying this motion, the trial court explained that defendant's attempt to establish a lack of "syndrome evidence" as an affirmative defense was improper and noted that such evidence has the very limited use of explaining a child's reaction to abuse and is not necessarily probative of abuse.[1]

Before defendant moved for in camera inspection of the victim's records, the victim testified at the preliminary examination that she did well in school. At trial, the victim and her father each testified that the victim did well in school and her teacher testified that, while the victim exhibited emotional difficulties, she did not have behavioral problems. The victim also testified that she was never hypnotized and that no one ever suggested to her or influenced her to assert, in therapy or otherwise, that she had been sexually abused. Additionally, defense counsel cross-examined the victim regarding the incidents and time frame of the sexual abuse perpetrated by defendant, the victim's reasons for disclosing the abuse in stages over time, her grades and behavior at school, and her relationships with friends and family members. Defense counsel also cross-examined Catherine Connell, a director of CARE House who interviewed the victim about the abuse when she was nine years old. Connell extensively reviewed the characteristics of sexual abuse and related them to the victim, demonstrating that the victim did not exhibit many of the typical characteristics that an abused child may exhibit. Defense counsel also questioned Connell at length about the impact of therapy on disclosure and whether a child of the victim's age and development would be impressionable or suggestible to the creation of false memories during therapy. Connell testified that it is common for children not to disclose or to only partially disclose events of abuse when they feel threatened or coerced and explained that it is also common that children have a difficulty establishing a time frame of the events. Connell further testified that, while very young children are suggestible, a child of the victim's age was no more suggestible than an adult. And she noted that it is not a normal practice in therapy to suggest to someone that they have been sexually abused.

Our review of the record reveals that defense counsel was able to elicit the information that he sought to discover in the victim's counseling and school records through the testimony of various witnesses. Therefore, the evidence defendant sought was not necessary to present the

[1] The trial court permitted defense counsel to cross-examine witnesses based on FIA reports that he received from an attorney representing defendant in a separate custody case, concluding that portions of these documents could be construed to be exculpatory in nature.

intended defense argument, *Stanaway, supra* at 679, and further, defendant has failed to demonstrate a reasonable probability that information contained in the counseling and school records would have changed the outcome of his trial. *Fink, supra* at 458-459. The trial court did not abuse its discretion in declining an in camera inspection of these records. *Babcock, supra* at 269; *Laws, supra* at 455.

Next, defendant argues that the trial court allowed an unfettered assault upon his character by permitting the victim and her brother to testify to uncharged, unspecified, and undefined allegations of sexual acts and violent behavior by defendant. We disagree. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Michigan Rule of Evidence 404(b) governs the admissibility of evidence of "other crimes, wrongs, or acts." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "Evidence of extrinsic crimes, wrongs, or acts of an individual generally is inadmissible in a criminal prosecution to prove that the defendant possessed a propensity to commit such acts." *People v Hall*, 433 Mich 573, 579; 447 NW2d 580 (1989). The purpose of this rule is to prevent a conviction based on defendant's history of misconduct rather than the facts of the present case. *Starr, supra* at 495. However, an exception exists where "the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

To be admissible, evidence of other bad acts must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by the potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "[T]he probative value outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973).

The prosecution filed a motion in limine to introduce other sexual acts by defendant against the victim. The trial court granted this motion, holding that evidence of uncharged acts before and after the charged acts was relevant and offered for a proper purpose, that the acts constituted a common scheme or plan, and that the probative value of the evidence outweighed the potential of unfair prejudice to defendant.

The victim testified at trial that while she was between the ages of seven and nine, defendant consistently abused her sexually during her visitations with her mother, with whom defendant was romantically involved. Defendant started with sexual touching, then progressed to putting his penis only partially inside her, and eventually to putting his entire penis inside her. Defendant penetrated the victim's vagina or anus on numerous occasions in the living room, in his vehicle, in her bedroom, in the bathroom, and when they went out running. When the victim's mother was not home, defendant let all the other children play outside, but he made the victim stay in the trailer so that he could engage in incidents of sexual abuse. The victim further testified that defendant would hit her whenever she closed her eyes during the incidents of sexual abuse, and that if she cried, he would yell at her and hit her. Defendant would tell the victim that it did not hurt and that if she did not stop crying, he would make her brothers clean the whole

house. Defendant also told the victim that God is not real and could not help her, and that he would kill her father's side of the family if she told anyone about the abuse. The victim testified that she was afraid of defendant and believed his threats because she had seen defendant hurt her mother and two brothers. She also testified she was afraid of angering him and making the situation worse for her siblings that lived with her mother and defendant.

We agree with the trial court that the victim's testimony was relevant to demonstrate how the abuse progressed and why she did not report it sooner. And it was offered for a proper purpose because it represented a common scheme or plan of sexual abuse and it showed more than defendant's propensity to commit abusive acts. The victim's brother testified that defendant was physically and verbally abusive toward him and another sibling and that they tried to spend as little time in the home as possible when defendant was present. This testimony corroborated the victim's testimony regarding the reasons she was hesitant to disclose the abuse over the years and to bolster the victim's credibility. Thus, it too was both relevant and offered for a proper purpose. While this testimony certainly was prejudicial to defendant, he was not unfairly prejudiced by it. Defense counsel attacked the victim's credibility throughout the trial, consistently pointing out inconsistencies in her prior disclosures, and called defendant's siblings as witnesses to refute the victim's and the victim's brother's testimony. Therefore, the trial court did not abuse its discretion when it admitted evidence of those prior acts. *Knox, supra* at 509.

Finally, defendant argues that the trial court erred in scoring 25 points for Offense Variable (OV) 2 for "terrorism" because defendant was nice and complimentary to the victim during incidents of abuse and in scoring 50 points for OV 12 for two or more penetrations. Defendant also asserts that the trial court's scoring was contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In reviewing the number of points scored at the trial level, this Court determines whether there was an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *Id*.

The statutory sentencing guidelines apply to enumerated felonies committed on or after January 1, 1999. *Babcock, supra* at 255; MCL 769.34(2). Defendant's acts occurred prior to 1999, so the former judicial guidelines were used to score defendant's offenses. *People v Buehler (On Remand)*, 271 Mich App 653, 657; 723 NW2d 578 (2006).

Under the judicial guidelines, defendant should be scored at 25 points for OV 2 if the victim suffered bodily injury or was subjected to terrorism. *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997). In this case, the court scored the 25 points for terrorism. "'Terrorism' is defined by the guidelines as 'conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense.'" *Id*. at 55. The trial court did not abuse its discretion in concluding that defendant's verbal and physical abuse, references to God not being real and not being able to help the victim, and threats to kill the victim's family were designed to substantially increase the victim's fear and anxiety during the offenses. In fact, there is substantial evidence that the victim was so afraid of defendant's threats that she did not tell anyone of the incidents until she thought everyone already knew, and even then, only partially disclosed the events for several years. Therefore, the trial court did not abuse its discretion in assessing defendant 25 points for OV 2.

Under the judicial guidelines, defendant should be scored 50 points for OV 12 if there were two or more sexual penetrations. *People v Raby*, 218 Mich App 78, 82; 554 NW2d 25 (1996), superseded by statute as stated in *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 137 (2001). In first-degree criminal sexual conduct, the penetration that forms the basis of the conviction offense may not be scored, but all penetrations arising out of the same criminal transaction may be scored. *Id*. at 82. Determining the number of penetrations that arise out of the same criminal transaction for purposes of scoring OV 12 is not limited in time to a specified number of hours, days or months. *Id.* Rather, penetrations arise out of the same criminal transaction when they "'[occur] in a continuous time sequence and [display] a single intent or goal.'" *Id.* at 82-83. As our Court explained in *Raby*, ongoing penetrations of a victim over an extended period can constitute acts that occurred in a continuous time sequence and displayed a single intent or goal, especially where, as here, the victim regularly saw defendant, who lived with the victim's mother, and defendant penetrated the victim routinely for almost two years, while threatening her to keep her from disclosing his actions. Such conduct "gives rise to an inference that defendant intended to conceal his continued molestation of the victim during that extended period. Thus, such conduct constituted acts that occurred in a continuous time sequence and displayed a single intent or goal." *Id.* at 83-84. Therefore, the trial court did not abuse its discretion in assessing defendant 50 points for OV 12.

Defendant also argues that under *Blakely*, he is entitled to be sentenced only on those facts actually found by the jury. However, *Blakely* has been held to apply only to determinate sentencing based on judicial fact-finding and not to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 161, 163-164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Therefore, this argument lacks merit.

We affirm.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra